NO. 72-1125

Supreme Court of the United States

October Term, 1973

A. Y. ALLEE, ET AL, *Appellants*
v.
FRANCISCO MEDRANO, ET AL, *Appellees.*

On Appeal From The United States District Court, Southern District of Texas, Brownsville Division

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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CITATIONS

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This brief *amicus,* in support of the appellees' position, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

A persistent theme in American social history has been the enlistment of law enforcement authorities "as allies of management in its attempt to prevent the organization and

strengthening of labor unions" (cf. *Boys Markets* v. *Clerks' Union*, 398 U.S. 235, 250). This case presents a flagrant example of the abuse of "law enforcement powers to suppress [a] strike • • • and to discourage attempts to engage in constitutionally protected conduct in support of [that] strike." J.S. 33, 51. That was the conclusion of the District Court, meticulously documented in its particulars. Thus, as the court below properly concluded, this is a proper case for the exercise of federal jurisdiction under the principles stated in *Younger* v. *Harris*, 401 U.S. 37 and its companion cases.[1]

Two of the major weapons employed by the appellant law officers here were the Texas statutes prohibiting mass picketing and secondary strikes, picketing and boycotts. Both of these provisions are aimed solely and directly at labor unions. For this reason we develop in this argument the proposition that both are unconstitutional, leaving it to appellees to treat with the other, and more generally applicable, statutes challenged in this litigation.

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[1] In arguing that the "bad faith or harassment" standard of *Younger* was not met appellants seek to avoid the problem posed by the findings of the court below by substituting their own version of the facts. While appellants thus invite the Court to decide this point on the basis of factual allegations and testimony discredited by the District Court, they do not, because they cannot, assert that the lower court's findings were clearly erroneous, F.R.Civ.P. 52(a). Indeed, since there is no challenge to the findings in the Questions Presented, appellants fail even to lay the jurisdictional foundation for such a claim. *Scripto, Inc.* v. *Carson*, 361 U.S. 376, 386, n. 12. For, the validity of the findings is an entirely different issue from the legal standard utilized in evaluating those findings, the only question presented on this phase of the case. See, e.g. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45.

1. We are first concerned with Article 5154d § 1 Part 1 of the revised Civil Statutes of Texas, denominated as the "mass picketing" statute, which forbids "more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets."[2]

This provision has been authoritatively construed by the Texas courts to be violated whenever its precise terms are not strictly complied with. *Geissler* v. *Cossoulis*, 424 S.W.

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[2] The text of this provision is set out in the Appendix, pp. 21-22 *infra*.

An admittedly closer question than that concerning Part 1 is presented with respect to the constitutionality of Article 5154d, § 1 Part 2. The basic principle that the State may regulate actual obstructions of entrances to private premises is unquestioned, and was fully understood by the District Court which sustained the constitutionality of Article 784. J.S. 70. The issue of the constitutionality of Article 5154d, § 1 Part 2 therefore turns on whether the court below correctly construed that provision as going impermissibly beyond *Cameron* v. *Johnson*, 390 U.S. 611, which upheld a Mississippi statute prohibiting "unreasonable" obstructions. Plainly, if, as the District Court apparently concluded (J.S. 63), Article 5154d § 1 Part 2 makes the physical presence alone of pickets an illegal obstruction, even if they are peaceful, and take every precaution not to interfere with free ingress and egress, the statute would interfere with the exercise of First Amendment rights without achieving any legitimate social objective. The District Court's reading of this provision as going this far, is, as that court noted, consistent with the Texas court's broad reading of Part 1, and is further buttressed by the fact that all three members of the District Court were Texas "practitioners before they ascended the bench [whose] view of [Texas] law necessarily are persuasive with" this Court (*Gooding* v. *Wilson*, 405 U.S. 518, 524).

Nevertheless, we recognize, as does the State, that this issue is of little practical importance in any event, since Article 784, which survives, fully preserves the authority of the State to eliminate actual obstructions. Indeed, the State regarded the matter as of

2d 709 (Texas Civ. App.—San Antonio 1969, error ref. n.r.e.); *Sabine Area Building Trades Council* v. *Temple Associates, Inc.*, 468 S.W. 2d 501 (Tex. Civ. App.—Beaumont, 1971, no writ). The Texas courts so held even while recognizing

> "that the distance and numbers formula, as applied to some situations, would, in fact, render otiose efforts to publicize the facts of a labor dispute by picketing and thus constitute an unreasonable interference with freedom of expression." *Geissler*, 424 S.W. 2d at 712.

In light of the understanding that strict application of the formula by law officers and courts can yield an unconstitutional restraint on protected First Amendment freedoms the statute plainly cannot stand. The *Geissler* court was of the view that

> "this does not require that the statute be regulated to the limbo of unconstitutional legislation. A statute valid as to one state of facts may be invalid as to another. *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U.S. 405 (1935)." *Ibid.*

But the *Walters* case declared the standard for determining the constitutionality of economic regulation against a claim of denial of substantive due process. A different standard must govern here:

> "It has long been recognized that the First Amend-

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such minor moment that it resisted plaintiff's suggestion that the order entered by the court below not reach Article 5154d § 1 Part 2 J.S. 64. This was apparently due to the State's tactical decision to combine its arguments on Parts 1 & 2, and thus to make its case on the numbers and distance formula appear in a more favorable light.

ment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

• • •

"Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct, see *Grayned* v. *City of Rockford*, 408 U.S. 104, 114-121 (1972); *Cameron* v. *Johnson*, 390 U.S. 611, 617-619 (1968); *Zwickler* v. *Koota*, 389 U.S. 241, 249-250 (1967); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)." *Broadrick* v. *Oklahoma*, 93 S. Ct. 2908, 2915-2916.[3]

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[3] Any limitations on the overbreadth doctrine which may be found in *Broadrick* do not affect this case. We are not concerned with the incidental deterrence of constitutional activity by a statute which touches upon First Amendment interests while regulating conduct outside the First Amendment. Rather, as for example, in *Shelton* v. *Tucker*, 364 U.S. 479, the basic subject regulated is the exercise of the First Amendment right to communicate and the question is whether the interest of the State in restricting First Amendment rights is compelling. In the terms of *Broadrick* the overbreadth of this statute is "not only • • • real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." If this statute has any "legitimate sweep" at all, it is only in the rare situation where picketing by more than two persons in any space of 50 feet actually or inevitably creates an obstruction, intimidation, or danger of violence. Moreover this statute while "regulating conduct in the shadow of the First Amendment" does not do so "in a neutral, noncensorial manner" but is "directed at particular groups [and] view points" namely, at labor unions and other organizations urging cooperation with their lawful objects. *Id.* at 2917, 2918.

In *Grayned*, this Court held:

> "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest. Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . .' Free expression 'must not, in the guise of regulation, be abridged or denied.' " 408 U.S. 104, 116-117 (footnotes omitted)

The two pickets, fifty feet rule, cannot be justified under this test. Plainly, a far greater number of pickets at any entrance can be allowed without any interference of movement in or out of the premises, and pickets at the plant, away from entrances and exits can cause no interference with ingress or egress.

As the court below recognized in its pre-*Grayned* decision:

> "Little imagination is required to envisage circumstances where groups of demonstrators, substantially larger than two persons, standing at closer quarters than fifty feet, would not threaten the safe flow of

traffic nor unreasonably interfere with free ingress or egress from nearby buildings." J.S. 62.

Appellants assert that "The State has long been recognized to have the right to regulate picketing but not to prohibit it." Tex. Br. p. 21.[4] We of course accept this proposition, but it does not aid appellants. The scope of the State's power to regulate picketing was delineated in *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 313-314:

> "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *AFL* v. *Swing*, 312 U.S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769 (1942); *Teamsters Local 795* v. *Newell*, 365 U.S. 341 (1958). To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i.e.*, patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See, *e.g.*, *Hughs* v. *Superior Court*, 339 U.S. 460 (1950); *International Bro. of Teamsters* v. *Vogt, Inc.* 354 U.S. 284 (1957); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Cameron* v. *Johnson*, 390 U.S 611. Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.
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> "The majority of the cases from this Court relied on by respondents, in support of their contention that

[4] "Tex. Br." refers to the brief for the appellants in this case.

> picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, *e.g., Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532 (1950); *Plumbers Local 10* v. *Graham*, 345 U.S. 192 (1953), or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice, *e.g., Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722 (1942) (secondary boycott); *Teamsters Local 309* v. *Hanke*, 339 U.S. 470 (1950) (self-employer union shop). Compare *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951), and *International Bro. of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951)."[5]

Since the numbers and distance formula of Article 5154d applies to picketing regardless of its objects, and does not even require proof that it is directed to coerce a decision by anyone, it cannot be sustained on the basis of the cases cited in the second paragraph of the foregoing passage. And insofar as the statute is sought to be sustained as a permissible limitation on the "conduct, i.e., patrolling" element of picketing *(ibid)*, the test is that set forth in *Grayned*, 408 U.S. at 116-117. As *Grayned* shows, Article

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[5] Whatever inroads *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, may have made on the ultimate holding of *Logan Valley*, the authority of the foregoing remains unimpaired. It was not disputed in *Tanner* that the distribution of handbills was the exercise of a First Amendment right; rather, the issue was whether the Constitution required a private party to allow distribution of the handbills on its private property. Article 5154d is not a trespass statute.

5154d is not a reasonable regulation because it is not "narrowly tailored to further the State's legitimate interests." *Ibid.*[6]

Finally, it does not save the numbers and distance formula that Texas has chosen to attach the epithet "mass picketing" to all picketing conducted by more than two persons within fifty feet of each other. As was said in *New York Times* v. *Sullivan*, 376 U.S. 254, 269, following *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429, " 'mere labels' of state law" are entitled to no weight in determining the scope of constitutional protections:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, ['mass picketing'] can claim no talismanic immunity from constitutional limitations. It must be

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[6] The decisions rendered at *nisi prius* in other states, cited by appellant (Tex. Br. 23-24) did not involve, much less sustain, a statute which purported to regulate the number and location of pickets. On the contrary, in each the Court issued an injunction to restrain picketing which was illegal because of its object or manner. *Rice & Holman* v. *United Electrical Workers*, 65 A.2d 638 (New Jersey Superior Ct. 1949) ("body-to-body" picketing); *Standard Appliances* v. *Korman*, 111 N.Y.S. 2d 783, 786 (New York S.Ct. 1952) ("disorderly" picketing); *Tarrytown Road Restaurant, Inc.* v. *Hotel and Restaurant Employees*, 115 N.Y.S. 2d 626, 631 (New York S.Ct. 1952) (illegal object); *Stern-fair Corporation* v. *Moving Pictures Operators*, 139 N.Y.S. 2d 145, 150 (New York S.Ct. 1955) ("misleading" signs); *Ballas Egg Products Company, Inc.* v. *Meat Cutters*, 160 N.E. 2d 164 (Ohio Ct.Com.Pls. 1959) (context of violence). Compare *Milk Wagon Drivers* v. *Meadowmoor*, 312 U.S. 287, 292.

> measured by standards that satisfy the First Amendment."

And under those standards, as most recently explicated in *Grayned*, 408 U.S. at 116-117 (see p. 8 *supra*), Part 1 of § 1 of Article 5154d is plainly unconstitutional.

2. Article 5154f, of the revised Civil Statutes of Texas, prohibits "secondary strikes, picketing and boycotts" as there defined.[7] Article 5154f, §§ 2d & h which denominate picketing by less than a majority of the picketed employer's employees as unlawful "secondary picketing," is sufficient, under this Court's precedents, to demonstrate that the State's prohibition of peaceful methods of communication on the ground that they are "secondary" is the starting point for constitutional analysis, not its conclusion:

> "[T]he Pennsylvania Supreme Court *** did emphasize that the pickets were not employees of Weis and were discouraging the public from patronizing the Weis market. However, those facts could in no way provide a constitutionally permissible independent basis for the decision because this Court has previously specifically held that picketing of a business enterprise cannot be prohibited on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *AFL* v. *Swing*, 312 U.S. 321. Compare *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769." *Logan Valley Plaza*, 391 U.S. at 314-315, emphasis in original.

In this area of the law, as in that covered by the "mass

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[7] The text of this provision is set out in the Appendix, pp. 22-24 *infra*.

picketing" statute just discussed, the State cannot rely on "'mere labels' of state law" to "claim • • • talismanic immunity from constitutional limitations." *New York Times,* 376 U.S. at 269.

As already noted, all communicative activity in public places is, of course, subject to regulation as to "time, place and manner." E.g. *Grayned,* 408 U.S. at 115. But prohibitions on communications in a labor dispute with a "secondary" object are not designed to serve the interest in orderly expression. They are a form of "subject matter" regulation, which restricts the right to picket, handbill, speak and assemble "on the basis of what [the individuals] intend to say" (*Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 96). Such "regulation thus slip[s] from the neutrality of time, place, and circumstance into a concern about content" (*id.* at 99), and is for that reason inherently suspect since "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (*id.* at 95-96).

Certainly, then, the absolute outer limit of the state's regulatory power is that set in the series of cases, which culminated in *Teamsters* v. *Vogt,* 354 U.S. 284, 291, "sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation." To the extent a state seeks to restrict picketing and, *a fortiori,* activity such as handbilling, the objective of which is *not* "counter to valid state policy," its efforts run counter to the First Amendment. It is equally well settled: first, that in determining the state's

policy, the "construction that the [State] Supreme Court has put upon the state statute * * * must, of course, [be] accept[ed]," (*Groppi* v. *Wisconsin*, 400 U.S. 505, 507); and, second, that state common law policies, as well as those enunciated in a statute, are relevant, *Teamsters* v. *Hanke*, 339 U.S. 470; *Vogt*, 354 U.S. at 293.

The policy of Texas with regard to so-called "secondary activity" is clear; the Texas law is in all salient respects the analogue of generally accepted common law principles as refined in § 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4). This is manifest from the Texas Supreme Court's leading decision in point, *Dallas General Drivers* v. *Wamix, Inc.*, 295 S.W.2d 873.

There, the highest court of the State, noting that the "public interest involved in industrial strife in intrastate business cannot be greatly different from the public interest in industrial strife in interstate business," and that § 8(b)(4) "is but a statutory restatement of the common-law rule against secondary boycotts" (*id.* at 882), squarely held that notwithstanding Art. 5154f §§ 2d & h, dealing with "secondary picketing":

> "It was immaterial to the right to picket Wamix that only a minority of its employees engaged in the picketing or that those picketing had been discharged from their employment. *International Union* v. *Cox*, 148 Tex. 42, 219 S.W.2d 787. Neither was picketing by Union at and near the project premises of the construction companies a violation of Article 5154f. In so far as that Article seeks to interdict picketing of all employers except those with whom a labor dispute exists on the part of their own employees, it offends against the Fourteenth Amendment and is unconstitutional. *Con-*

struction and General Labor Union v. *Stephenson*, 148 Tex. 434, 225 S.W.2d 958; *American Federation of Labor* v. *Swing*, 312 U.S. 321. If picketing cannot be limited to an employer who has a labor dispute with his employees it necessarily cannot be limited to the premises of such an employer." 295 S.W.2d at 881.

And notwithstanding the breadth of both the secondary picketing provision and Art. 5154f § 2e, dealing with secondary boycotts, the *Wamix* court stated that:

> "The nature of a secondary boycott which is contrary to the public policy of this state, [is] that it involves the application of coercive pressure on one not a party to a labor dispute to withdraw patronage from an employer with whom a dispute exists. 285 S.W.2d 947. Judge Learned Hand has defined a secondary boycott in these words: 'The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands.' *International Brotherhood, etc.* v. *N.L.R.B.*, 181 F.2d 34, 37." 295 S.W.2d at 881-882.

On this basis it concluded that:

> "There is no such coercive pressure in the restricted activity of pickets accompanying trucks to job sites. The judgment is obviously erroneous in enjoining Union from having its pickets accompany Wamix trucks to job sites." *Id.* at 882; Compare *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 772, 775.

The State Court then went on to state:

> "We have long since held that the business of the

neutral will not be protected from the harmful effects of picketing in all instances and under all circumstances, *Ex Parte Henry,* 147 Tex. 315, 215 S.W.2d 588, so that we may not now, without overruling Ex Parte Henry, lay it down as an inexorable rule of decision that all picketing which results in incidental pressure on and harm to a neutral may be enjoined. On the other hand, it is also now well settled that picketing will be enjoined if it is principally directed at and operative on a neutral. *Cain, Brogden & Cain* v. *Local Union No. 47, etc., supra; Carpenters and Joiners Union* v. *Ritter's Cafe,* Tex. Civ. App., 133 S.W.2d 223, on subsequent appeal, 149 S.W.2d 694; 315 U.S. 722. * * * two important factors in determining whether picketing in a particular case because of its secondary effect on neutral employers is proscribed by the public policy are: (a) the good faith intent of the union or striking employees in picketing a secondary situs to exert pressure only on the primary employer, to which effort the effect on neutral employers is purely incidental, and (b) the balancing of relative rights of all affected parties against the harm which would result to the other parties and to the public from permitting or restraining the picketing." 295 S.W.2d at 882, 884. Compare *NLRB* v. *Operating Engineers,* 400 U.S. 297, 303; *Steelworkers* v. *NLRB (Carrier Corp.),* 376 U.S. 492, 502; *Electrical Workers* v. *NLRB (General Electric),* 366 U.S. 667, 673.

Nevertheless, and in plain disregard of the limits of the "valid state policy" on "secondary" activity articulated by the Texas Supreme Court, the appellant law officer, have utilized the bare language of Article 5154f, read at its broadest, as an engine of oppression "to suppress the farm workers strike" (J.S. 55). Thus, for example, the Article 5154f charges in connection with picketing, and efforts to

organize picketing, at Mission, Texas on May 26, 1967 (J.S. 45-50), were in complete disregard of the principles enunciated some twenty years before in *Ex Parte Henry*, 215 S.W. 2d 588 (reaffirmed in *Wamix*, 295 S.W.2d at 882) where the Texas Supreme Court held:

> "So the competent testimony shows that relators did engage in picketing on a public street but adjacent to the premises and in front of one entrance to the plant of the employer with whom their union had a bona fide labor dispute; that their picketing was free of threats or violence, was not carried on by more than two pickets at any time and constituted no physical obstruction to anybody going into or coming out of the plant; that, however, it violated the trial court's order in being carried on within 100 feet of the spur tracks while the railway employees were using them in an effort to transport freight into the plant; and that it was intended to urge the railway employees 'not to serve' the plant and that it accomplished that purpose.
>
> "As we have seen, the conduct which was held contemptuous because in violation of the injunction granted in Greenville Cotton Oil Mill Co. v. Amer. Fed. of Grain Processors, A. F. of L., et al., amounted only to peaceful picketing, which not only is not unlawful but is protected by the First and Fourteenth Amendments. • • • In this connection, it seems to be the position of respondents that since the employees of the railways would not cross the picket line manned by relators, the picketing and the consequent refusal of the railway employees to serve the employer's plant constitute such concerted action between relators and those employees as to amount to secondary picketing and boycotting and conspiracy in restraint of trade, as denounced by our statutes. Under the decisions of the Supreme Court already cited and discussed, picketing

> does not offend against the statutes merely because third parties who come to the area of the dispute may prove sympathetic to one disputant rather than to the other. We overrule the point." 215 S.W.2d at 592, 594-595.

The District Court's injunction against further misuse of Article 5154f by the appellant law officers was, therefore, plainly proper.

The declaratory judgment by the court below that Article 5154f is unconstitutionally overboard was also proper. To be sure, this case is analogous to *Douglas* v. *Jeanette,* 319 U.S. 157, in that the Texas Supreme Court has already recognized that Art. 5154f does not meet constitutional requirements and has reformed the Texas law of "secondary" activity to bring it within the requirements stated in *IBEW* v. *NLRB,* 341 U.S. 694. But, here, as opposed to *Douglas,* even after the decisions which have limited the statute, there *are* "ground[s] for supposing that the intervention of a federal court, in order to secure [appellees] constitutional rights, [is both] necessary [and] appropriate," since it *does* "appear from the record that [appellees] have been threatened with injury other than that incidental to every criminal proceeding brought lawfully and in good faith" (319 U.S. at 164, 165). Thus the issuance of declaratory relief to preclude further misuse of this hollow statutory shell was correct. The action of the District Court complements and completes the prior actions of the Texas Supreme Court, it does not run counter to them.

3. In conclusion, we should address ourselves to the State's argument that there is a constitutional distinction between "public issue" picketing and the regulation of

labor union picketing. Tex Br. p. 22.[8] Even the District Court, though otherwise faithful to this Court's rulings, has read the decisions since *Thornhill* v. *Alabama*, 310 U.S. 88, as imposing "two distinct standards of regulation • • • one for 'public issue' picketing and another for 'private issue' picketing." As these terms are used by the District Court:

> " 'Public issue' picketing involves publicizing opinions or grievances which are directed at society as a whole—the 'civil dissent' demonstrations of today. 'Private issue' picketing involves publicizing particular disputes; this class is confined almost exclusively to labor-dispute picketing." J.S. 59.

This distinction finds no support in the decisions of this Court.

As early as *Senn* v. *Tile Layers Union*, 301 U.S. 468, 478, Mr. Justice Brandeis held for the Court that:

> " • • • Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution • • •."

Senn was followed by *Thornhill*, 310 U.S. at 102 which expressly held that:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute

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[8] A similar view was taken by the Virginia Supreme Court in *Austin* v. *Old Dominion Branch No. 496, etc.*, 213 Va. 377, 192 S.E.2d 737, probable jurisdiction noted, 412 U.S. (May 29, 1973) (No. 72-1180). See the discussion of that point at pp. 8-10 of the brief *amicus curiae* of the AFL-CIO in that case.

> must be regarded as within that area of free discussion that is guaranteed by the Constitution."

Decisions subsequent to *Thornhill* have left that core holding undisturbed. See *Logan Valley Plaza*, 391 U.S. at 313-314 quoted at pp. 7-8 *supra*.

Conversely, as *Cox* v. *Louisiana*, 379 U.S. 559, and *Cameron* v. *Johnson*, 390 U.S. 611, both cited in *Logan Valley*, show, picketing by civil rights groups is subject to regulation in both its means and objects on the same basis as picketing by labor unions.

This is in accord with the Court's recognition that the First Amendment reaches labor controversies:

> "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins*, 323 U.S. 516, 531.

It is particularly significant, in the context of the present case, that in *Thomas*, as here, the purpose of the speech and the meeting which the Court held to be constitutionally protected was to urge workingmen to join a union.

Indeed, any double standard of the sort envisaged by the court below would contravene the fundamental proposition that:

> "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social

> utility of the ideas and beliefs which are offered." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 444-445.

Thus, in *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 8, this Court followed *Button* and stated:

> "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." See also, e.g. *Branzburg* v. *Hayes,* 408 U.S. 665, 704-705; *Schacht* v. *United States,* 398 U.S. 58, 62-63; *Niemotko* v. *Maryland,* 340 U.S. 268, 272-273.

And, when in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, an ordinance which restricted all picketing except labor picketing was struck down as violative of the equal protection clause, this Court did not remotely suggest that an ordinance imposing special restrictions on labor picketing alone would be regarded more favorably. On the contrary, the Court said:

> "In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation thus slip[s] from the neutrality of time, place, and circumstance into a concern about content. *This is never permitted." Id.* at 99, footnote omitted, emphasis added.

CONCLUSION

For the above noted reasons as well as those stated by appellees the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

1. Article 5154d § 1 of the revised Civil Statutes of Texas reads as follows:

> It shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activity that shall constitute mass picketing as herein defined.
>
> "Mass picketing" as that term is used herein, shall mean any form of picketing in which:
>
> 1. There are more than two (2) pickets at any time within fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.
>
> 2. Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed or to any other premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions.
>
> The term "picket," as used in this Act, shall include any person stationed by or acting for and in behalf of any organization for the purpose of inducing, or attempting to induce, anyone not to enter the premises in question or to observe the premises so as to ascertain who enters or patronizes the same, or who by any means follows employees or patrons of the place being picketed either to or from said place so as either to observe them or attempt to persuade them to cease entering or patronizing the premises being picketed.
>
> The term "picketing," as used in this Act, shall include the stationing or posting of one's person or of others for and in behalf of any organization to induce anyone not to enter the premises in question, or to

observe the premises so as to ascertain who enters or patronizes the same, or to follow employees or patrons of the place being picketed either to or from said place so as to observe them or attempt to persuade them to cease entering or patronizing the premises being picketed.

2. Article 5154f of the revised Civil Statutes of Texas reads as follows:

Section 1. It shall be unlawful for any person or persons, or association of persons, or any labor union, incorporated or unincorporated, or the members or agents thereof, acting singly or in concert with others, to establish, call, participate in, aid or abet a secondary strike, or secondary picketing, or a secondary boycott, as those terms are defined herein.

Section 2. As used in this Act:

a. The term "labor union" means every association, group, union, national and local, branch or subordinate organization of any union of working men, incorporated or unincorporated, organized and existing in part for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, and shall include the local, state, national and international affiliates of such organizations or unions.

b. "Secondary strike" shall mean a temporary stoppage of work by the concerted action of two or more employees of an employer where no labor dispute exists between the employer and such employees and where such temporary stoppage results from a labor dispute to which such two or more employees are not parties.

c. The term "picket" shall include any person sta-

tioned by or acting in behalf of any organization for the purpose of inducing anyone not to enter the premises in question; or for apprising the public by signs, banners, or other means, of the existence of a labor-dispute at or near the premises in question; or for observing the premises so as to ascertain who enters or patronizes the same; or any person who by any means follows employees or patrons of the place being picketed either to or from such place so as to either observe them or to attempt to persuade them to cease entering or patronizing the premises being picketed.

d. The term "secondary picketing" shall mean the act of establishing a picket or pickets at or near the premises of any employer where no labor dispute, as that term is defined in this Act, exists between such employer and his employees.

e. The term "secondary boycott" shall include any combination, plan, agreement or compact entered into or any concerted action by two or more persons to cause injury or damages to any person, firm or corporation for whom they are not employees, by

(1) Withholding patronage, labor or other beneficial business intercourse from such person, firm or corporation; or

(2) Picketing such person, firm or corporation; or

(3) Refusing to handle, install, use or work on the equipment or supplies of such person, firm or corporation; or

(4) Instigating or fomenting a strike against such person, firm or corporation; or

(5) Interfering with or attempting to prevent the free flow of commerce; or

(6) By any other means causing or attempting to

cause an employer with whom they have a labor dispute to inflict any damage or injury to an employer who is not a party to such labor dispute.

f. The term "employer" means any person, firm or corporation who engages the services of an employee.

g. The term "employee" shall include any person, other than an independent contractor, working for another for hire in the State of Texas.

h. The term "labor dispute" is limited to and means any controversy between an employer and the majority of his employees concerning wages, hours or conditions of employment; provided that if any of the employees are members of a labor union, the controversy between such employer and a majority of the employees belonging to such union, concerning wages, hours or conditions of employment, shall be deemed, as to the employee members only of such union, a labor dispute within the meaning of this Act.